BEFORE THE

# Federal Communications Commission

WASHINGTON, D. C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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| In the Matter of<br><br>Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992<br><br>Development of Competition and Diversity in Video Programming Distribution and Carriage | ) | MM Docket No. 92-265 |

**REPLY COMMENTS OF LANDMARK COMMUNICATIONS, INC.**


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## REPLY COMMENTS OF LANDMARK COMMUNICATIONS, INC.

Landmark Communications, Inc. ("Landmark") hereby submits its Reply Comments in the above-captioned proceeding.[1]

### I. INTRODUCTION AND SUMMARY

Section 628 of the Cable Television Consumer Protection and Competition Act of 1992 ("the Act")[2] only prohibits conduct of a vertically-integrated programmer when such conduct both (1) constitutes an "unfair" or "deceptive" method of competition; and (2) significantly harms competition in the marketplace. Although some Commenters apparently support a more expansive

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[1] Notice of Proposed Rulemaking in MM Docket 92-265, FCC 92-543 (rel. Dec. 24, 1992) ("Notice").

[2] 47 U.S.C. Sec. 548.

interpretation of Section 628,[3] they offer no persuasive rationale for abandoning the above interpretation, which comports with Congressional intent and averts the potential to substantially disrupt the cable television programming business.

When determining what is an "unfair" or "deceptive" practice which significantly harms competition, the Commission will reduce its administrative burden and contribute significantly to increased marketplace certainty by embracing the following principles:

(1) look to the conduct of non-vertically integrated programmers to provide the standard to assess the actions of vertically-integrated programmers;

(2) apply Section 628 prospectively only; thus the Commission should not abrogate existing contracts, nor rely upon uniform, across-the-board rate increases as the basis for Section 628 complaints, nor permit complainants to rely upon previously-existing contracts to prove a Section 628 violation;

(3) adopt safe harbors for pricing differentials that do not constitute a violation of Section 628;

(4) recognize that the Act permits a variety of discounts based upon the number of subscribers a distributor serves; and

(5) exempt from Section 628 program services whose conduct cannot possibly cause the prohibited harm to competition, including: (1) services with low

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[3] See, e.g., Coalition of Concerned Wireless Cable Operators ("Coalition") Comments at 2-5; Competitive Cable Association ("CCA") Comments at 8-10; Attorneys General of Texas, Maryland, Ohio and Pennsylvania ("Attorneys General") Comments at 4-11; National Rural Telecommunications Cooperative and the Consumer Federation of America ("NRTC et al.") Comments at 13; The Wireless Cable Association International, Inc. ("WCA") Comments at 20, 30-34; Joint Comments of Bell Atlantic and the Pacific Companies ("Bell Atlantic et al.") at 3-8; Rochester Telephone Corporation ("Rochester") Comments at 3-4; NYNEX Telephone Companies ("NYNEX") Comments at 2-7.

penetration; (2) new or start-up services (including a significant relaunch); (3) services with relatively low viewership; (4) services with reasonable substitutes; and (5) services which are vertically-integrated with a relatively small MSO.

## II. LANDMARK'S RESPONSE TO SPECIFIC ARGUMENTS RAISED BY COMMENTERS

### A. The Commission Should Reject Any Proposals by Commenters to Interpret Section 628(b) as a Per Se Ban on Certain Conduct or as a Broad Prohibition Encompassing All Cable Programmers

Section 628(b) bars vertically integrated program services from engaging in "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[4] Both the plain language of the Act and the legislative history clarify that for a vertically-integrated programmer to violate Section 628(b), it must engage in an (1) "unfair" or "deceptive" method of competition which (2) has a significant harmful impact on competition.[5] Section 628(c),

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4 47 U.S.C. Sec. 548(b) (emphasis added).

5 See Landmark Comments at 5-6; see also Tele-Communications, Inc. ("TCI") Comments at 5-7; Time Warner Entertainment Company, L.P. ("Time Warner") Comments at 4-12; Liberty Media Corporation Comments at 4-11; Discovery Communications, Inc. Comments at 6, 14-16; National Cable Television Association ("NCTA") Comments, Inc. at 6-10.

because it requires the Commission promulgate regulations to "specify particular conduct that is prohibited by subsection (b),"[6] must also be interpreted in light of this two-prong test.[7]

This two-part test in Section 628 is also consistent with economic and antitrust learning.[8] Any other reading of Section 628 is impermissible from the standpoint of statutory construction. The Joint Comments of the National Rural Telecommunications Cooperative and the Consumer Federation of America ("NRTC et al.") and the Coalition of Concerned Wireless Cable Operators ("Coalition"), urging that all differences in prices, terms or conditions constitute per se unlawful discrimination under Section 628(b),[9] or the Attorneys General

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[6] 47 U.S.C. Sec. 548(c)(1) (emphasis added).

[7] While concurring with the proposed two-step analysis under Section 628(c), NCTA proposes in addition that the Commission determine preliminarily whether a difference in price, terms or conditions actually exists. NCTA correctly points out that the price, terms or conditions may not be identical, but, taken as a whole, may be comparable. Such comparability should not be deemed discrimination within the meaning of Section 628. NCTA Comments at 19-20. Landmark agrees with this common sense approach.

[8] See generally TCI Comments at 5-33 and TCI Attachment by Stanley M. Besen, Steven R. Brenner, and John R. Woodbury, "Exclusivity and Differential Pricing for Cable Program Services" (Jan. 25, 1993) ("the Besen Paper").

[9] See NRTC et al. Comments at 13. Cf. United States Satellite Broadcasting Company, Inc. ("USSB") Comments at 3 (harm equals the inability of a distributor to obtain programming at a fair, non-discriminatory price in an arms-length negotiation); Coalition Comments at 5 (discrimination presumed where programming is denied outright or sold only at an increased fee); but see WCA Comments at 28 (Section 628 is generally not a per se ban on any activity).

of Texas, Maryland, Ohio and Pennsylvania ("Attorneys General") proposal that the Commission should mandate a uniform pricing structure to reflect costs,[10] are simply contrary to the plain language of the Act and should be rejected by the Commission.

In addition, the suggestion of several Commenters that Section 628(b)'s reach extends to all cable programmers, regardless of whether they are vertically integrated,[11] must also be rejected as contrary to Congressional intent. Congress's primary concern in enacting Section 628 was to counter what it perceived as negative effects of significant vertical integration.[12] Thus, Section 628 should be construed to apply solely to vertically-integrated cable programmers who have the capability to harm competition in the marketplace in violation of Section 628(b).

### B. Section 628 and the Commission's Regulations Should Be Applied Prospectively

Some Commenters, for example, the United States Satellite Broadcasting Company, Inc. ("USSB"), The Wireless Cable Association, International, Inc. ("WCA") and NRTC et al., appear

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[10] See Attorneys General Comments at 9-10.

[11] See, e.g., Coalition Comments at 2; Attorneys General Comments at 4-5; WCA Comments at 23, note 51; Bell Atlantic et al. Comments at 3-5; NYNEX Comments at 5-7; Rochester Comments at 3.

[12] See Landmark Comments at 9, 20-21; For a more extended analysis of the issue that Section 628 is limited to vertically-integrated cable operators, see TCI Comments at 10-11.

to urge the Commission to interpret Section 628 retroactively.[13] Such a position is badly misguided. These Commenters fail to account for the disruptive nature of retroactive application of a statute to contracts and completely ignore the harm that such application would cause programmers, distributors, and ultimately, consumers.

As explained previously,[14] as a matter of law and policy, the Commission should not enforce Section 628 retroactively. To do so would not only be contrary to legal precedent, it would create chaotic uncertainty, thus risking the financial stability of programmers and reducing the capital available for programming.

If the Commission's actions effectively abrogated (or limited the length of) existing distribution contracts, Landmark would be significantly harmed. These contracts, to a large measure, define the level of revenue for program services such as The Weather Channel and The Travel Channel. Moreover, other aspects of the program services business, for example, contracts relating to advertising, programming, and equipment, are premised on the revenue stream established by distribution contracts. The fundamental uncertainty resulting from contract abrogation; i.e., the inability to accurately predict its revenue stream, would significantly hamper Landmark's ability to make intelligent

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[13] See USSB Comments at 4; NRTC et al. Comments at 32-33; WCA Comments at 28-30.

[14] See Landmark Comments at 10-14.

decisions on programming, equipment and other capital expenditures. And, because renegotiating abrogated contracts would be complicated (particularly if a number of contracts need to be renegotiated), uncertainty would continue for an extended period.

If the Commission fails to adhere to the principle of contract certainty, it will face countless obstacles, requiring numerous and detailed regulations to properly resolve the inevitable controversies that abrogation would cause. For example, would all distribution contracts be automatically and immediately abrogated? If not, which contracts are abrogated? What are the criteria for determining abrogation? Who would have the right abrogate contracts? When is that right available?

Moreover, programming services and the Commission would not be the sole casualties stemming from the uncertainty created by contract abrogation. The costs, both direct and indirect, of having to renegotiate all of these abrogated contracts would be potentially enormous, and eventually would translate into higher prices for consumers. Thus the Commission should reject, as a matter of law and policy, all claims that Section 628 has retroactive effect.

The Commission must also ensure that complainants may not use contracts entered into before the effective date of the Commission's rules under Section 628 as a basis for proving that a contract entered into after that time violates Section 628. Such a practice would be contrary to legal precedent, and would also be patently unfair. If Landmark knew when it originally negotiated its contracts that they would be used against them in the future to prove a violation of the law, this knowledge would have affected the terms of the original contract. To hold contracting parties to knowledge of the law before the law is susceptible of knowledge is not only unfair, it is impermissible under relevant legal precedent.[15]

### C. The Commission Should Exempt From Section 628 Those Entities Which Cannot Harm the Marketplace as Proscribed by Section 628(b)

As clarified in the legislative history, Section 628 is designed to regulate conduct of programmers with significant vertical integration.[16] Comments by some parties[17] urging a broader interpretation ignore the negative impact such interpretation would have on innovation by newer and smaller programmers, as well as the need to ensure that the program access rules are effectively administrated. These concerns will be much better accommodated if the Commission expressly exempts the following categories of vertically-integrated programming services from Section 628's prohibitions: (1) services with low penetration; (2) start-up or relaunch services; (3) services with

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[15] See Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988); see also Singer, Sutherland Statutory Construction, Sec. 41.02 (Sands 4th ed. 1992).

[16] See Landmark Comments at 20-21.

[17] See supra note 11.

relatively low viewership; (4) services with reasonable substitutes; and (5) services which are vertically-integrated with a relatively small MSO.

Of these exemptions, low penetration (in terms of subscriber households) is the most important. The Commission should not restrict the pricing policies of program services with low penetration because such services have no market power and no ability to harm competition.[18]

An exemption based on low penetration would be particularly useful for start-up program services. The exemption would give such services the flexibility they need at the time they need it most; i.e., during the early stages when the ability to encourage distribution is critical to an effective launch and long-term viability. For the reasons cited in its Comments, Landmark also believes that the new service exemption should apply to services that are so substantially revised in format or content as to constitute a relaunch or rebirth of the service. In its Comments, Landmark proposed criteria for identifying such a service.[19] Services in a substantial relaunch phase need

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[18] Cf. Coalition Comments at 2 (a cable operator's ability to influence a program supplier's decision is primarily a function of size); but see Attorneys General Comments at 6. The Attorneys General claim that cable operators with a limited market share should not be excluded from the reach of Section 628(b) because usually these operators are de facto monopolists in their franchise area with the power to exclude competition. However, Attorneys General have misconstrued the standard under Section 628(b). Subsection (b) is concerned with the cable programmer whose conduct has an adverse effect on competition, not with whether a de facto monopoly exists.

[19] See Landmark Comments at 23-24.

flexibility to encourage distribution for the same reasons as new services.

Landmark demonstrated in its Comments in this proceeding,[20] that services with relatively low viewership, services for which there are reasonable substitutes, and services which are vertically-integrated with a smaller MSO should also receive exemptions. Relatively low viewership indicates that a program service may not be unusually valuable in driving penetration; thus a distributor cannot credibly claim that carriage of such programming is necessary for competitive survival. Services with practical substitutes, in turn, do not pose a threat to competition because a distributor has alternative programming from which to choose. Likewise, vertical integration with a relatively small MSO does not pose a threat to competition because of the smaller MSO's inability to successfully engage in anti-competitive behavior.

### D. Volume Discounts Are Universally Recognized As a Legitimate Business Practice

Numerous entities have recognized the benefits of volume discounts including Congress, the Commission, antitrust courts, and economic analysts.[21] Yet some Commenters take issue with

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[20] Id. at 22-27.

[21] See Landmark Comments at 18-20; see also TCI Comments at 18-23; Besen Paper at 4-26.

the virtues of volume discounts.[22] Landmark achieves numerous benefits by providing volume discounts to its customers. Advertiser-supported services such as The Weather Channel and The Travel Channel must produce a high volume of subscribers to generate revenue. Larger MSOs are well-situated to provide the benefits of increased volume. In addition, Landmark realizes many administrative efficiencies in dealing with one MSO versus multiple cable operators to achieve the same number of subscribers. Thus, the Commission should interpret the volume discount provision in Section 628(c)(2)(B)(iii) of the Act broadly so that the efficiencies of volume are not lost in the program marketplace.

To the extent that the Community Antenna Television Association ("CATA") suggests that it should receive identical volume discounts to those of a larger MSO, this violates Congressional intent. CATA's suggestion is merely a veiled demand to renegotiate contracts which were originally entered into in arms-length transactions. They wish to lower their costs to make more money. Their call for "price subsidies" will not encourage competition, which is the purpose of Section 628; instead they will receive an economic windfall (from which consumers likely will not benefit because the Act does not mandate that the windfall be passed along to consumers) at the expense of increased costs to programmers.

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[22] See Attorneys General Comments at 14 (the Commission should only permit cost-based volume discounts); Community Antenna Television Association ("CATA") Comments at 2-5.

## E. Section 628 Should Apply Only in Areas Where the Programmer is Actually Vertically-Integrated

Section 628 should only apply in those markets where the programmer has common ownership with the cable operator. These markets were the ones which concerned Congress. It makes little sense to police against anticompetitive conduct which results from vertical integration in a market where a programmer has no ownership interest or other control of a distributor. Several Commenters who suggest the Commission hold otherwise[23] offer no persuasive rationale other than their desire to manipulate the statute to lower their costs. Since, as noted, the Act does not require that any such cost savings be passed on to consumers, this is hardly a persuasive public policy rationale.

[23] See, e.g., WCA Comments at 30-34 (WCA's support for this conclusion relies upon anecdotal evidence of discrimination occurring several years ago, and the fact that if Congress had wanted to limit Section 628 in that way it would have explicitly concurred with the Commission's recommendations in the 1990 Cable Report, Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd. 4962 (1990)); cf. Attorneys General Comments at 5-9 (their argument is also based upon the 1990 Cable Report, a report which contains a view of the cable market as it was 2-4 years previously).

### F. The Commission Must Adopt a Definition of Attribution Which Relates To Ownership or Some Other Form of Control

Consistent with its past precedent,[24] the Commission should adopt an attribution rule which focuses on whether an entity's ownership interest in a second entity gives it "control" over the second entity.

The Competitive Cable Association ("CCA") proposes to define an attributable interest as including "any competitive situation where one of the local cable operations...is owned or controlled by any of the top-100 MSO's (or, alternatively, any MSO that has access to 50,000 or more subscribers nationwide)."[25] Landmark submits that this proposed definition is ridiculous. The 50th largest MSO has a 0.29% share of the marketplace, and the 100th largest MSO has a 0.08% share.[26] Although 0.08% might be CCA's idea of attribution, it certainly should not be the Commission's.

Moreover, there is nothing in the Act or its legislative history to suggest that the fact that a programmer has an affiliation agreement with a large distributor means that this relationship is attributable. The Commission's rules on attribution for other services clearly relate to ownership or

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[24] See, e.g., Attribution of Ownership Interests, 97 FCC 2d 997 (1984); 47 C.F.R. Sec. 73.3555, Note 2; Telephone Company-Cable Television Cross-Ownership Rules, 7 FCC Rcd. 5781, 5819 (1992).

[25] CCA Comments at 6.

[26] See NCTA, Cable Television Developments 13-A, 14-A (Oct. 1992); Cablevision, Jun. 29, 1992, at 52.

status, such as officers or directors.[27] These types of relationships confer upon an entity a legal right to influence or control an organization. A distributor, on the other hand, can only hope to influence a supplier; it has no right to control such supplier. The fact that one entity has bargaining power in a particular setting should not result in a finding of attribution.

This conclusion is logical in light of Congress's purposes in enacting Section 628. Surely Congress did not intend to suggest that a programmer's responsiveness to the needs and desires of its distributors would create a suspect relationship which justified special governmental regulation. A competitive marketplace economy, by definition, presumes that suppliers will strive to satisfy the needs of their customers, and those who are best at so doing will prosper. Thus, sensitivity to a customer's wishes should not be counted for purposes of attribution.

In addition, Landmark proposes that the Commission define an attributable interest in a manner that exempts relatively small MSOs from Section 628. As Landmark demonstrated in its initial Comments, small MSOs cannot cause the harm to competition prohibited by Section 628(b). A programmer affiliated with a small MSO could not survive by serving only or even principally that MSO. Such programmers must look to unaffiliated distributors for the majority of carriage that is necessary to ensure viability. For example, in its Comments, Landmark noted

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[27] See supra note 24.

that The Weather Channel serves over 53 million cable subscribers and over 1.2 million HSD, MMDS and SMATV subscribers, compared with TeleCable's 685,000 subscribers. In the national markets in which they operate, programmers simply cannot confer anticompetitive benefits on their relatively small vertically-integrated cable operations, because the benefits of such practices for the cable operations would not outweigh the costs to the national programming operations. Thus, Landmark believes that the Commission should define attribution such that relatively small MSOs are exempted from the strictures of Section 628.

### G. The Commission Should Ensure That Its Enforcement Procedures Reflect the Two-Part Test Under Section 628 and Afford Full Due Process to Those Claims Arising Under the Act

Landmark believes that enforcement of Section 628 will be much more effective if the Commission articulates clear rules to implement that section. The ability of programmers and distributors to know their rights and obligations will reduce controversies and, in turn, the need for enforcement.

In this regard, the plain language of the Act makes clear that the prima facie case under Section 628 requires proof of both: (1) an "unfair" or "deceptive" method of competition; and (2) a significant harmful impact on competition. As Landmark has previously proposed, the Commission should adopt safe harbors for pricing differentials that do not constitute a violation of

Section 628, and exempt entities which cannot possibly create the harmful effect on competition proscribed in Section 628.

If the Commission adopts such an approach, it will significantly reduce administrative burden and expense by reducing the number of controversies and rendering some disputes relatively easy to resolve. However, Landmark believes that, to the extent the Commission is faced with a serious case which cannot be easily resolved, it should afford all parties full due process.[28]

Landmark does not support the use of Alternative Dispute Resolution ("ADR"), favored by several Commenters,[29] as a means to resolve Section 628 complaints. Frivolous claims can result in significant costs, even under an ADR system. This would be particularly harmful for new services. ADR may have the potential of encouraging frivolous claims, and therefore should not be an alternative to adoption of clear rules which will help increase marketplace efficiency.

In addition, Section 628 clearly limits its remedies to the "aggrieved multichannel video programming distributor."[30] Thus the Commission should reject any suggestions by Commenters[31] that subscribers should be allowed to file Section 628

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[28] See TCI Comments at 37-43.

[29] See, e.g., USSB Comments at 4; Attorneys General Comments at 14-15.

[30] See 47 U.S.C. Sec. 548(e)(1), (d).

[31] See, e.g., NYNEX Comments at 15-16.

complaints. The statute does not permit standing for subscribers, and such standing has the potential to overwhelm absolutely the Commission's resources.

## III. CONCLUSION

For these reasons, Landmark respectfully recommends that the Commission adopt regulations to implement Section 628 of the Act consistent with the proposals contained herein and in its initial Comments.

Respectfully submitted,

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